LAW AND EQUITY COURT OF THE CITY OF RICHMOND.

JOSEPH E. GLENN v. F. C. MURPHY, ET ALS.*

January 10, 1905.

1. DELINQUENT LANDS—*Va. Code 1904, secs. 661 and 666—Application to purchase from Commonwealth—Pending suits—Parties.* The provision of sec. 666 of Va. Code 1904, that no application shall be made to purchase delinquent lands from the Commonwealth "if at the time of such application suit is pending either to satisfy debts due creditors or for partition among parties interested until after the land has been sold in said suit and the court has failed to cause the taxes to be paid out of the purchase money," has reference to suits pending anywhere in any court having jurisdiction in the Commonwealth; it is express, positive and mandatory; it is jurisdictional; it is a denial to the applicant of the right to file an application to purchase where suit is pending; it avoids any act of the clerk in furtherance of an application filed against its inhibition; it has never been repealed either expressly or by implication; and the limitation of two years on suits to avoid tax deeds, contained in sec. 661 of Va. Code 1904, can have no application to it. The requirements of the above provision were met where the heirs were parties, though the administrator was not a party.

2. DELINQUENT LANDS—*Va. Code 1904, sec. 661—Limitation on suits. Quære:* Does the provision of sec. 661 of Va. Code 1904, providing a limitation of two years on suits to avoid tax deeds, have a retroactive effect?

Upon demurrer to evidence by plaintiff in an action of ejectment.

W. H. Werth and *Samuel A. Anderson,* for plaintiff.

John A. Lamb and *L. O. Wendenburg,* for defendants.

HON. JOHN H. INGRAM, Judge.

This case was argued with great force both orally and in writing, and the questions presented are exceedingly nice. But, after all, its decision will rest upon the true meaning of section 666 of the Code as it existed when the application to purchase was filed in this case with the clerk of the Hustings Court of Richmond, and when under its provisions said clerk made the deed to the applicant and the same was recorded. To get at the true meaning and intent of this section, which is the duty of the court in every case where a law is to be interpreted conformable to Bacon's idea of the province of a judge, whose duty is *jus dicere* and not *jus dare,* it

*Reported by George C. Gregory.

will be necessary to keep in mind the difference between this law and another section of the Code (661), as it existed before and at the time of the proceedings, had by and at the instance and on behalf of Jos. E. Glenn, the applicant to purchase.

Cardwell, Judge, in the case of *Va. B. & L. Co.* v. *Glenn,* 99 Va. 465, sharply contrasts the difference and distinction between these two sections; he says: "Section 661 of the Code applies only to deeds acquired by parties who purchase directly at the original tax sale, and section 666 is the section under which the title to property bought in for the Commonwealth may be acquired by an applicant to purchase the same, and which provides that the terms of section 661 shall apply to deeds made under authority of this section. Clearly a deed can not be made under authority of section 666 unless its provisions are complied with. The effect of a deed under section 661 is to cut off inquiry as to the matters preceding the time at which the Comomnwealth acquired her rights to subject the property to sale for taxes due thereon, but, before the purchaser under section 666 can claim the benefit of the terms of section 661, he must show that he has fulfilled the provisions of section 666, and until he is in a position to do this, there *is no authority for making him a deed for the property.* (Italics mine.) The legislature would not have done so useless a thing as to require certain steps to be taken by the purchaser entirely independent of the steps by which the Commonwealth acquired her title to property bought for the delinquent taxes due thereon, and then allow the purchaser at his will to refuse or fail to comply with the only terms upon which he has the right to purchase from the Commonwealth. In no view of this statute, providing how title to lands held by the Commonwealth for delinquent taxes may be acquired by a purchaser, does it appear that the legislature intended that the purchaser should be protected by the provisions of section 661, if he had not acquired his deed by compliance with the provisions of section 666."

Before making this deliverance for the court, the learned Judge said: "We deem it wholly unnecessary to consider the question whether or not section 661, as amended by the act of March 7th, 1900, applies to deeds made before the amendment was adopted. The object of the law before and since that amendment was to give to the original owner an opportunity to redeem his property and

to protect innocent parties who had property rights therein." And again, speaking for the court, the judge said: "In the case at bar the deed was made confessedly without compliance with the provisions of that statute (666), as no sort of notice was given to appellant or its trustee of the proceedings upon the application to purchase the property resulting in the deed under which the appellee claims. So to construe the statute as to bring appellee within the protection of 661 would make it plainly a violation both of the spirit and letter of the fourteenth amendment of the Constitution of the United States, which provides that no person shall be deprived of his property without due process of law, i. e., without notice of the proceedings by which it is done, and an opportunity to be heard."

I have thus quoted freely from the opinion of the court, not that I think it is directly conclusive of the questions presented to me for decision in this particular case, but as showing how careful the court was to require a strict compliance with all of the essentials and statutory requirements of section 666, which since the Act of 1897-8, p. 343, has been known generally as the "Land Grabbers' Law," before making stable as against the owner of the property or other person entitled to redeem, the title of the applicant to purchase or purchaser after deed delivered, and who in this case was Mr. Jos. E. Glenn.

In the case of *Matthews* v. *Glenn,* 9 Va. Law Reg. 546, Judge Grinnan, of the Chancery Court of this city, held that "the act of March 7, 1900, Acts 1899-1900, p. 1234 (it being section 661 of Va. Code 1904), creating a limitation of two years on suits to avoid tax deeds, has no application to deeds made prior to its enactment, since there is nothing on the face of the Act to indicate that it is to be given a retroactive effect—citing for the proposition *Crabtree* v. *Building Association,* 96 Va. 677, to the effect that "courts will not construe a statute so as to give it a retroactive effect unless there is something on the face of the enactment putting it beyond a doubt that such was the purpose of the legislature. The appeal from this decision was denied and from the reading of the opinion of Judge Grinnan, referred to above, in denying the appeal, the Supreme Court of Appeals necessarily held with the chancellor that the Act was merely prospective because the gist of the suit was the failure of the officer to use due diligence

in locating Mrs. Matthews, for service on her of the notice of application to purchase — and which made the affidavit fatally defective upon which publication of notice was based, and for which defect the clerk's deed to Glenn was held to be void. If the limitation in the act had been *retroactive,* the defense of Mrs. Matthews would not and could not have availed her. In the brief of counsel for Glenn it is contended that in *Brown* v. *Bradshaw,* 100 Va. 124, the act of limitation aforementioned was applied retroactively. My reading of the case does not bear out this contention; two years had not elapsed from recordation of tax deed when suit in ejectment was brought by Brown to recover property coming through tax deed, and, as plaintiff was within the statute, limitation was not involved. Nor does the court anywhere in its opinion, either directly or by indirection, so indicate, and the court, although it speaks of sec. 661 as amended and re-enacted by Act of March 7, 1900, really refers only to the old provision of sec. 661 as to "proof that the taxes and levies for which said real estate was sold were not properly chargeable thereon, or that the taxes and levies properly chargeable thereon have been paid." But whether the Supreme Court in refusing the appeal intended to hold that Judge Grinnan was correct or not in his opinion that the limitation in the Act of March 7th, 1900, was not retroactive, is a question that in my opinion, in the case here, I am not called on to decide, for whether retroactive or not, under the very terms of the section 666 as it now stands, and as it stood in the Act of 1897-8, p. 343, no application could be made under it, to purchase any real estate, if at the time of such application suit was pending either to satisfy debts due creditors or for partition among the parties interested until after the land has been sold in said suit and the court has failed to cause the taxes to be paid out of the purchase money. There is this distinction, however, on this point, in the Act of 1897-8, p. 343, and the Act of 1902-3, p. 695. In the first Act the suit must be pending in the courts of the county or corporation *where the real estate is situated;* under the present law the suit may be pending anywhere in any of the courts having jurisdiction in the Commonwealth. The place of the suit is not confined to the county or corporation where the land is situated. (A legislative straw, perhaps, but it shows how the wind is blowing, and from what direction.) This provision in the Act of 1897-8 and in the

present statute is express and positive; it is mandatory; it is jurisdictional; it is of the very essence and substance of the Act itself; it is a denial to the applicant to file an application to purchase where suit is pending; it forbids not only the applicant, but it necessarily avoids any act of the clerk, in furtherance of an application filed against its inhibition; it has never been repealed, either expressly or by implication; it still exists in the law, but is more far-reaching than it was under the original Act, for now the applicant can not file his application if suit is pending, whether in the county or corporation where the real estate is situated or not. The statute of limitations contained in the Act of March 7th, 1900, can have no application to it. It was not so intended. The legislature would be put in the foolish position of denying in express terms an applicant a right, and, in another statute on the same subject, saying that "Although it is thus enacted, if, against our inhibition you obtain title to real estate, unless suit is brought to upset your title within two years your illegal title is declared good and legal." If such was the intention of the legislature, it has signally failed expressly so to declare, nor by fair intendment or implication has it done so. The facts here are that suit was pending in the Chancery Court to subject this very real estate to a judgment debt of the decedent real estate owner, in whose name it went delinquent, when Glenn filed his application. That suit is pending to-day. The point is made that Cates, the first administrator, was not a party to the suit. The heirs were parties, the title to the real estate was in them and not in Cates, the administrator. The only reason for the administrator being a party to such a suit is that the personal estate is the primary fund for the payment of debt. Cates ought to have been a party instead of Ann Murphy, the second administratrix. This could have been done on suggestion at any time. It can be done now. And I hold that within the meaning and intent of the statute of 1897-8, p. 343, gathered from its express language, suit was pending to subject the real estate (for which Glenn filed his application to purchase), in the county and corporation in which it was situated, to subject it to the payment of the debts of James Murphy and the deed from Christian, Clerk, I hold to be a nullity. Judgment on the demurrer to the evidence will be entered for the defendants.

NOTE.—The Supreme Court of Appeals refused an application for a writ of error in this case.